IN THE MISSOURI SUPREME COURT

No. SC86089

JERRY AND KIMBERLY NORMAN,
Husband and Wife, and
JERRY NORMAN,
Plaintiff Ad Litem, for
KENNETH NORMAN,
A Deceased Minor,

Appellants,

vs.

ANDY J. WRIGHT, M.D.

Respondent.

Appeal from the Circuit Court of Greene County, Mo.
Thirty First Judicial Circuit, Division No. 2
The Honorable J. Miles Sweeney, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from the trial court's ruling that granted respondent's alternative motion for leave to amend his answer to plead §537.060, RSMo, as an affirmative defense after the conclusion of trial. Jurisdiction in this case is proper because on August 24, 2004, this Court granted transfer after an opinion by the Missouri Court of Appeals, Southern District, pursuant to Article V, §10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

This appeal is from the Judgment of the Honorable J. Miles Sweeney of the Circuit Court of Greene County sustaining respondent's Motion for Leave to File an Amended Answer on July 30, 2003 (L.F. 22, 177-89, 194, 207, 712-13). This ruling permitted respondent to file an amended answer which pled a credit against the jury's verdict in the amount of $100,000 pursuant to §537.060, RSMo, and Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003) (L.F. 22, 177-89, 194, 207, 712-13).

The civil suit from which this appeal arises commenced on February 14, 1997, when Jerry and Kimberly Norman (appellants) filed their Petition for Damages (L.F. 2, 24). Appellants alleged that Andy J. Wright, M.D. (respondent) committed medical negligence during the course of the delivery of their child, Kenneth Norman (L.F. 24-39). They also accused Joseph Johnson, M.D. and St. John's Regional Health Center of similar acts of medical negligence (L.F. 24-39).

On July 26, 2000, pursuant to §537.060, RSMo, the trial court approved a settlement between appellants and Joseph Johnson, M.D. and St. John's Regional Health Center in the amount of $100,000 (L.F. 10, 41, 85).

On August 8, 2000, respondent pled apportionment of fault pursuant to §538.230, RSMo, requesting the trial court to instruct the jury at trial to apportion fault among the various defendants—the settling defendants and the respondent (L.F. 22, 43-46). Appellants opposed respondent's request for apportionment in a pleading filed on August 10, 2000 (L.F. 11, 47-50). Appellants claimed that for

respondent to preserve his right to apportionment of fault under §538.230, RSMo, he was required to plead allegations of wrongdoing on the part of the settling defendants (L.F. 47-50).

The trial court agreed with appellants and ordered respondent to provide "a short and plain statement of the facts for each allegation of negligence and/or fault asserted against any separate settling defendant" (L.F. 51-57). Respondent did not plead such facts and waived his rights to proceed with an apportionment of fault under §538.230, RSMo (L.F. 92).

The jury trial commenced on July 23, 2001, the Honorable J. Miles Sweeney presiding (L.F. 17-19). On July 31, 2001, after the close of the evidence and closing arguments, the jury returned a verdict in favor of appellants for $308,855.35 (L.F. 19, 79).

One week after trial, on August 7, 2001, respondent filed a motion for reduction of the jury verdict in the amount of $100,000, under §537.060, RSMo (L.F. 19, 81-95). In that motion, respondent claimed that because he did not seek apportionment of fault at trial pursuant to §538.230, RSMo, and because §537.060, RSMo, allows a reduction of the verdict by the amount of the pretrial settlement—in this case $100,000—the trial court should enter its judgment for the final amount of $208,855.35: the $308,855.35 verdict less the pretrial settlement of $100,000 (L.F. 81-95).

The trial court then heard argument on respondent's motion to reduce the verdict and took that matter under advisement while awaiting further briefing on

the issue (L.F. 20). Appellants filed a motion opposing respondent's request for a reduction of the jury verdict on August 20, 2001 (L.F. 19, 96). In response, respondent requested leave, on August 23, 2001, to file an amended answer to plead §537.060, RSMo, as an affirmative defense, prior to the court's final entry of judgment (L.F. 19, 123-46).

In this alternative motion for leave to amend his answer, respondent argued that pursuant Rule 55.33 and §537.060, RSMo, the trial court should grant him leave to amend his answer to plead a reduction of the verdict in the amount of the pretrial settlement (L.F. 123-27, 141-46).

On August 29, 2001, the trial court heard argument on respondent's motion for leave to amend his answer to plead §537.060, RSMo, as an affirmative defense (L.F. 20). After entertaining argument from both parties, the trial court denied respondent's motion for leave to amend his answer, but granted his alternative motion to reduce the jury's verdict by $100,000 pursuant to §537.060, RSMo (L.F. 20).

The trial court entered its final judgment on August 30, 2001, in the amount of $208,855.35 plus costs of $12,963.21 for a total of $221,818.56 (L.F. 20, 147-48). Thereafter, both parties then filed separate motions for a new trial (L.F. 20, 150-68).

On October 9, 2001, the trial court sustained Defendant – Judgment Debtor's Motion/Application For An Order Showing Satisfaction of Judgment (L.F. 21; Supp. L.F. 1-5). This motion demonstrated that respondent satisfied the

outstanding judgment by delivering to appellants a cashier's check for $223,732.87—$208,855.35 plus court costs of $12,963.21 and interest of $1,914.31. (L.F. 21; Supp. L.F. 1-5).

Appellants appealed the trial court's judgment awarding them $221,818.56 to the Missouri Court of Appeals, Southern District, on October 2, 2001 (L.F. 20, 147, 169). The Southern District affirmed the trial court's ruling on June 18, 2002. Norman v. Wright, No. SD24524, Slip Op. (Mo. App. S.D. June 18, 2002).

This Court granted transfer for the first time in this case on August 27, 2002 (L.F. 172). In an opinion handed down on March 18, 2003, this Court reversed the trial court's judgment granting respondent's motion to reduce the verdict under §537.060, RSMo (L.F. 172-78). Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003).

This Court abrogated existing caselaw by holding that Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. E.D. 1999) "should no longer be followed." Norman, *supra* at 785. This Court further held that in order to be entitled to the benefits of §537.060, RSMo, respondent was required to plead a credit under §537.060, RSMo, as an affirmative defense pursuant to Rule 55.01. Norman, *supra* at 785-86.

However, in footnote two, this Court noted that the trial court denied respondent's post-trial "motion for leave to amend his pleadings to include a request for a reduction under section 537.060" (L.F. 176). Id. at 786. This Court then stated, "[t]his Court need not decide how late a trial court may permit

amendment of the pleadings in order to request a reduction under section 537.060" (L.F. 176). Id.

On March 27, 2003, nine days after this Court issued its first opinion in this case, and pursuant to that opinion, respondent filed a second motion for leave to amend his answer to plead a reduction under §537.060, RSMo, as an affirmative defense (L.F. 21, 177). In that motion, respondent reminded the trial court that he had filed a similar motion immediately after trial, which the trial court had denied since it had sustained respondent's motion for a credit under §537.060, RSMo (L.F. 177-89). Appellants opposed respondent's motion for leave to amend his answer via correspondence with the trial court (L.F. 191).

On May 20, 2003, the trial court granted respondent leave to amend his answer to affirmatively plead a credit under §537.060, RSMo (L.F. 22, 194). Appellants then filed a motion for reconsideration, which the trial court denied (L.F. 22, 202).

Thereafter, respondent amended his answer to plead §537.060, RSMo, as an affirmative defense and, on July 30, 2003, the trial court entered its judgment awarding appellants $208,855.35 (L.F. 22, 195, 699-700).

On May 26, 2004, the Missouri Court of Appeals for the Southern District reversed and remanded the trial court's judgment. Norman v. Wright, No. SD25818, Slip Op. (Mo. App. S.D. May 26, 2004).

This Court granted transfer for the second time in this case on August 24, 2004.

ARGUMENT

Point I

The trial court did not palpably and obviously abuse its discretion when it granted respondent's motion for leave to amend his answer because when examining the factors that apply to a request for leave to amend a pleading, appellants have failed to show that the trial court abused its discretion or that appellants suffered prejudice in that they have received the entire amount awarded to them by the jury.

In their first point on appeal, appellants claim the trial court "abused its discretion and erred" when it granted respondent's motion to amend his answer (App. Br. 20-21, 48-49). They specifically contend that the trial court "failed to balance all the proper factors" and had the trial court properly evaluated the factors, the facts would "weigh overwhelmingly against granting the amendment" (App. Br. 20-21, 48-49).

A. Standard of Review

Supreme Court Rule 55.33(a) states that leave to amend a pleading "shall be freely given when justice so requires." Further, "the trial judge has broad discretion to permit amendment of the pleadings at any stage of the proceedings, even after verdict." Asmus v. Capital Region Family Practice, 115 S.W.3d 427, 432 (Mo. App. W.D. 2003); *see* Dye v. Division of Child Support Enforcement, Dept. of Social Services, State of Mo., 811 S.W.2d 355, 358 (Mo. banc 1991) ("It is the sense of our rules that amendments be liberally allowed and that the

principle of relation back be freely applied. Whether to allow an amendment even after hearing, but before judgment, is a matter for the discretion of the trial court, with which we are not disposed to interfere.") (citations omitted).

The review of a trial court's ruling granting leave to amend a pleading is for an abuse of discretion; whether to grant or deny "leave to amend is within the sound discretion of the trial court, and its decision will not be disturbed unless there is a showing that such court palpably and obviously abused its discretion." Moore v. Firstar Bank, 96 S.W.3d 898, 903 (Mo. App. S.D. 2003); *see also*, Dye v. Division of Child Support Enforcement, Dept. of Social Services, State of Mo. *supra* at 358.

"Judicial discretion is abused when the court's ruling is clearly against the logic of the circumstances presented to the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." Moore, *supra* at 903-04; Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo. banc 2000).

Moreover, and most importantly, this Court presumes that the trial court's ruling is correct and appellants must show both that the trial court abused its discretion and that they suffered prejudice as a result. Anglim v. Missouri Pacific R. Co., 832 S.W.2d 298, 303 (Mo. banc 1992) ("the appellant bears the burden of showing an abuse of discretion.") *See also* Boyer v. Sinclair & Rush, Inc., 67 S.W.3d 627, 634 (Mo. App. E.D. 2002) ("A ruling within the trial court's discretion is presumed correct and the appellant bears the burden of showing the

trial court abused its discretion and that they have been prejudiced by the abuse."); KC Excavating and Grading, Inc. v. Crane Const. Co., 141 S.W.3d 401, 408 (Mo. App. W.D. 2004) ("It is the appellant's burden to persuade us that the circuit court abused its discretion and that the abuse resulted in prejudice.").

B. Factual Background

As noted above, this suit commenced on February 14, 1997 when appellants filed their petition alleging medical negligence (L.F. 2, 24-39). Over three years later, on July 26, 2000, appellants, with court approval, settled with two of the named defendants—Joseph Johnson, M.D. and St. John's Regional Health Center—for $100,000 (L.F. 41). At that point, respondent asked for apportionment of fault among the various defendants under §538.230, RSMo, but he eventually waived his rights under §538.230, RSMo, and proceeded to trial (L.F. 17-19, 43-46, 92).

The jury trial concluded on July 31, 2001, with a verdict in favor of appellants for $308,855.35 (L.F. 19, 79). On August 7, 2001, a week after the conclusion of the trial, respondent filed a motion, pursuant to §537.060, RSMo, requesting a reduction of the verdict in the amount of the $100,000 settlement (L.F. 19, 81-95). Fifteen days later, on August 22, 2001, respondent filed an alternative motion, requesting leave to amend his answer to plead a reduction of the verdict under §537.060, RSMo, as an affirmative defense (L.F. 19, 123-46).

After considering both parties' positions as well as "extensive" oral argument from the parties on respondent's motion for leave to amend, the trial

court denied respondent's motion to amend his answer and granted his alternative motion for a reduction of the verdict pursuant to §537.060, RSMo (L.F. 19-20).

Over eighteen months later, on March 27, 2003, after this Court's opinion in Norman v. Wright, 100 S.W.3d 783, 786 (Mo. banc 2003), required that §537.060, RSMo, be pleaded as an affirmative defense, respondent filed a second motion for leave to file an amended answer to plead §537.060, RSMo, as an affirmative defense (L.F. 21, 177-82). Id. at 786.

On May 20, 2003, the trial court, in a letter to the parties, granted respondent's motion for leave to amend (L.F. 22, 194) (the court's letter is attached hereto in the appendix). In that letter, the trial court noted that denying respondent's motion for leave to amend would "amount to a windfall" for appellants (L.F. 194). The trial court further noted appellants' argument that if respondent had pled §537.060, RSMo, as an affirmative defense before trial, they would have asked for apportionment under §538.230, RSMo (L.F. 194). After consideration of this argument, the trial court noted that such a pleading on the part of appellants may have resulted in appellants "end[ing] up in a better position" or a "worse position" (L.F. 194; Resp. Appx. A-1). The trial court entered its judgment granting respondent's motion for leave to amend on July 30, 2003 (L.F. 22, 712-13).

C. Analysis

Appellants now claim that the trial court's ruling was an abuse of discretion (App. Br. 20-21, 48-49). They specifically argue that the trial court did not

properly consider the five factors they claim underlie a decision regarding the granting or denial of an amendment of the pleadings (App. Br. 20-21, 48-49).

To support their claim that the trial court must analyze five factors to determine whether to grant or deny a motion for leave to amend, appellants cite four cases (App. Br. 51). Of the four, only one case, Foman v. Davis, 371 U.S. 178, 182 (1962), contains more than three items for consideration regarding amendment of the pleadings. However, Foman does not list any factors for analysis; Foman merely holds that in the absence of any of several listed reasons for delay in amending the pleadings, leave to amend should be "freely given." Id. at 182.

The other three cases appellants list are Missouri cases, all of which list only three factors the trial court must consider when deciding whether to grant or deny leave to amend the pleadings. Lester v. Sayles, 850 S.W.2d 858, 869 (Mo. banc 1993); Hospital Dev. Corp. v. Park Lane Land Co., 813 S.W.2d 904, 907 (Mo. App. E.D. 1991); Baker v. City of Kansas City, 671 S.W.2d 325, 329 (Mo. App. W.D. 1984).

Further, in what appears to be this Court's most recent cases that use these factors to examine the propriety of the trial court's ruling regarding amendment of pleadings, this Court has used only three factors:

(1) the hardship to the moving party if the request is denied;

(2) the reasons for failure to include the matter in a designated pleading; and

(3) the injustice or prejudice caused the opposing party if the request is granted. 66, Inc. v. Crestwood Redevelopment Corporation, 998 S.W.2d 32, 43 (Mo. banc 1999); Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo. banc 1994), Lester v. Sayles, *supra* at 869.

However, the five factors used by appellants are found in recent opinions from the Missouri Courts of Appeal. *See* Moore v. Firstar Bank, 96 S.W.3d 898, 903 (Mo. App. S.D. 2003); Manzer v. Sanchez, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999) (the court listed five factors for analysis when considering whether to permit the amendment of a petition); Lay v. P & G Health Care, Inc., 37 S.W.3d 310, 327 (Mo. App. W.D. 2000) (the court used the same five factors in Moore, *supra*, and Manzer, *supra*, to analyze the propriety of the trial court's denial of a motion for leave to amend an answer).

Therefore, respondent, out of an abundance of caution, will examine not only the three factors recently used by this Court but also the remaining factors used by appellants and analyzed by the Courts of Appeal (App. Br. 52-54, 56-60). Moore, *supra*.

1. Appellants Fail to Show that the Trial Court did not Properly Consider the Hardship to the Moving Party if the Request is Denied.

The first factor this Court uses to determine the propriety of granting or denying leave to amend pleadings is "the hardship to the moving party if the request is denied." Crestwood, 998 S.W.2d at 43. Appellants argue that any claims respondent makes regarding hardship are "simply contrived" and that this

factor weighs against respondent since either outcome of this appeal will cost one party $100,000 (App. Br. 51-52).

Appellants fail to properly analyze this factor (App. Br. 51-52). They merely note the undisputed fact that whether the trial court granted or denied respondent's motion for leave to amend, one party would gain $100,000 plus interest and one party will lose that same amount (App. Br. 51-52).

As its title suggests, the proper analysis of this factor calls for considering the hardship on the moving party, not the hardship of each party compared to the other. Id. It is undisputed that the hardship on the movant—respondent—should this Court reverse the trial court's ruling that permitted respondent to amend his answer will be the loss of $100,000 plus any post-judgment interest accrued thereon (L.F. 185-94). *See* §408.040.1, RSMo.

Not only do appellants fail to properly analyze this factor in their brief, but they also fail to provide any facts showing that the trial court failed to properly analyze this factor (App. Br. 51-52). They offer no facts or conclusions showing that the trial court failed to consider this factor at all or that the trial court analyzed this factor but its analysis was somehow erroneous (App. Br. 51-52). They make no allegation whatsoever concerning the trial court's consideration of this factor (App. Br. 51-52).

As a result, appellants have failed to prove that the trial court palpably and obviously abused its discretion in the analysis of this factor. Anglim, 832 S.W.2d at 303; Dye, 811 S.W.2d at 358. Under these circumstances, their claim fails.

2. Appellants Have Failed to Show that the Trial Court Did Not Consider the Reasons for Failure to Include the Matter in a Designated Pleading (appellants' third factor).

The second factor this Court considers is "the reasons for failure to include the matter in a designated pleading[.]" Crestwood, *supra* at 43. Appellants argue that respondent has never "suggested any valid reason for his decision to not request a more timely amendment" (App. Br. 54).

Both of respondent's motions for leave to amend were filed pursuant to Missouri caselaw in effect at the time of the filings. Julien v. St. Louis University, 10 S.W. 3d 150, 152 (Mo. App. E.D. 1999); Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003). As noted above, respondent filed two motions for leave to amend his answer to plead §537.060, RSMo, as an affirmative defense—on August 22, 2001 and March 27, 2003 (L.F. 19, 21, 123-46, 177-82).

The motion filed on August 22, 2001, was filed as an alternative to respondent's motion for a reduction of the verdict, which was filed after trial because, according to the Missouri caselaw at that time, post-trial motions pursuant to §537.060, RSMo, were properly granted after trial. *See* Julien v. St. Louis University, 10 S.W. 3d 150, 152 (Mo. App. E.D. 1999) (the court held that "[a] section 537.060 motion for satisfaction of judgment may be filed, considered and ruled at any time after the entry of a judgment.").

Thus, as noted above, respondent's alternative motion, requesting leave to amend his answer to plead a reduction of the verdict under §537.060, RSMo, as an

affirmative defense, was filed the first time 22 days after the conclusion of the jury trial (L.F. 19, 123-46). Respondent filed this motion after trial because the law permitted him to do so. Julien v. St. Louis University, 10 S.W. 3d 150, 152 (Mo. App. E.D. 1999).

Respondent had no way of knowing that this Court would abrogate Julien, *supra*, in Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003). Respondent was then following then-existing caselaw and could not have anticipated this Court's ruling more than eighteen months in the future. Hence, the timing of respondent's motion for leave to amend was based on the state of the law when he filed his motion. Julien, *supra*.

Moreover, as noted above, on March 27, 2003, respondent filed a second motion for leave to amend his answer to plead a reduction under §537.060, RSMo, as an affirmative defense—nine days after this Court issued its opinion in Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003) (L.F. 21, 177). Respondent filed this motion pursuant to this Court's opinion in Norman, *supra*, which held that a litigant seeking to gain a reduction of the verdict under §537.060, RSMo, is required to plead §537.060, RSMo, as an affirmative defense. Id. at 785-86.

In addition to its holding regarding affirmative defenses in Norman, this Court declined to instruct the trial court on the timeliness of motions to amend the pleadings or the propriety of granting those motions. Id. at 786. This Court specifically held that it "need not decide how late a trial court may permit amendment of the pleadings in order to request a reduction under section

537.060." Id. The trial court subsequently granted respondent's second motion for leave to amend his answer on July 30, 2003 (L.F. 22, 712-13).

As a result, the trial court's ruling was not an abuse of discretion since this Court declined to give instruction regarding the limits of the trial court's discretion regarding the timeliness of motions for leave to amend (L.F. 22, 194).

Appellants' argument under this section fails because they have failed to show that the trial court did not analyze this factor or analyzed this factor improperly. They simply state that "the trial court failed to require or even ask for one as such is required to exercise proper of discretion [sic]" (App. Br. 55).

Yet, they cite no cases for their proposition that the trial court must ask for and receive such a reason explaining the timeliness of such a motion for leave to amend (App. Br. 55). "Where an appellant neither cites relevant authority in support of its position, nor offers an explanation for why none is available, an appellate court is justified in considering the point abandoned." Schubert v. Trailmobile Trailer, L.L.C., 111 S.W.3d 897, 906 (Mo. App. S.D. 2003). *See also* Thummel v. King, 570 S.W.2d 679, 687 (Mo. banc 1978).

Under these circumstances, appellants have failed to meet their burden to show that the trial court palpably and obviously abused its discretion when it granted respondent leave to amend its answer. Anglim, 832 S.W.2d at 303; Dye, 811 S.W.2d at 358. Thus, their claim fails.

3. Appellants Failed to Prove that they Suffered Prejudice (appellants' fourth factor).

The third factor for analyzing the propriety of the grant or denial of a motion for leave to amend an answer to add an affirmative defense is, "the injustice or prejudice caused the opposing party if the request is granted." Crestwood, *supra* at 43. This factor "is essentially a rule of prejudice." Lester v. Sayles, 850 S.W.2d 858, 869 (Mo. banc 1993).

Appellants' claim of prejudice is that the "record is replete" with their "complaints of hardship and injustice"—however, they offer no facts to support that conclusion (App. Br. 55). They further contend that "nowhere in the record of this case is it even suggested that the trial court even took into consideration even one of the multiple ways the Normans would be harmed by granting this motion" (App. Br. 56).

Yet in its letter to the parties on May 203, 2003, the trial court clearly addressed the prejudice to appellants: "The Court is not unmindful of Mr. Ransin's argument that he could have asked for apportionment if the reduction had been pled and could have ended up in a better position. It also seems to me that he could have ended up in a worse position." (L.F. 194).

This observation by the trial court is precisely the issue of prejudice before this Court—appellants could not show to the trial court, nor can they show this Court, that the outcome at trial would have been altered had respondent pled §537.060, RSMo, as an affirmative defense before trial.

Because appellants cannot show that they suffered prejudice, as is their burden on appeal, their claim fails. *See* Boyer, *supra*, 67 S.W.3d at 634 (Mo. App. E.D. 2002) ("A ruling within the trial court's discretion is presumed correct and the appellant bears the burden of showing the trial court abused its discretion and that they have been prejudiced by the abuse."), and KC Excavating, *supra*, 141 S.W.3d at 408 (Mo. App. W.D. 2004) ("It is the appellant's burden to persuade us that the circuit court abused its discretion and that the abuse resulted in prejudice.").

The gravamen of appellants' complaint of prejudice is that they "were fully prepared to call experts to support apportionment of fault claims regarding the fault of the settling Defendants under Section 538.230 R.S.Mo." (App. Br. 56).

The implication in this statement is, of course, that had respondent pled §537.060, RSMo, before trial, appellants would have asked for apportionment of fault under §538.230, RSMo. In fact, on this same page of their brief, appellants unequivocally state that "If the Section 537.060 R.S.Mo. amendment had been made before trial, the Normans were prepared to trump it with their own Section 538.230, R.S.Mo. request in an amended pleading" (App. Br. 56).

This statement is completely unsupported by any factual basis. Appellants do mention that they had experts "ready to put minimal fault on the settling defendants" (App. Br. 56). Yet, this statement is only evidence that appellants could have pled apportionment under §538.230, RSMo; it does not mean that they would have asked for apportionment. Their brief contains no facts supporting

their contention that they would have asked for apportionment, which is further indication of their inability to prove prejudice.

Moreover, as the trial court observed in its May 20, 2003, letter to the parties, even if respondent had pled §537.060, RSMo, before trial and appellants had subsequently asked for apportionment under §538.230, RSMo, there is simply no way to look back and determine whether appellants would have gained a larger verdict at trial or a larger net result.

Assuming appellants could return to the pretrial preparations in this case and request apportionment of fault under §538.230, RSMo, there are simply too many variables for them to show that they were prejudiced—i.e. they would have achieved a different outcome at trial.

Requesting apportionment would have required that appellants adduce evidence at trial proving not only that respondent was negligent but also that the settling parties were at fault (L.F. 47-50, 51-57). If the jury thought the settling parties were more negligent than respondent, appellants could end up with a high fault/low verdict scenario or if the jury assigned a minimal amount of fault to the settling parties, as the trial court stated, they could "have ended up in a better position" (L.F. 194).

The possible outcomes are endless—to the extent such speculative hindsight proves fruitless, appellants are unable to prove that they suffered prejudice, as is their burden.

Therefore, because appellants cannot meet their burden of proving prejudice, this point on appeal fails. Anglim, *supra*; Boyer, *supra*.

Appellants' claims of prejudice also fail because they have already received the $308,855.35 awarded to them by the jury (L.F. 10, 19, 21, 41-42, 79; Supp. L.F. 1-6). Brown v. Kneibert Clinic, 871 S.W.2d 2, 3 (Mo. App. E.D. 1993). This award was for the total damages sustained by plaintiffs (L.F. 79). The verdict form attached hereto in the appendix shows that the jury's award for the "damages" sustained by plaintiffs—it was not was not limited to only those damages allegedly caused by respondent (L.F. 79).

Through the settlement with St. John's Regional Health Center and Joseph Johnson, M.D., appellants received $100,000 and after trial, respondent paid appellants $223,732.87, including post-judgment interest for a total of $323,732.87 (L.F. 10, 21, 41-42, 79; Supp L.F. 1-6).

In Brown, the plaintiff was injured when a physician negligently used a faulty snare to remove a colon polyp. Id. at 3. The plaintiff filed two suits, a product liability suit against the equipment manufacturer and a malpractice suit against the clinic that employed the physician. Id. Before trial, the plaintiff settled with the manufacturer for $197,500. Id. After trial on the negligence claim against the clinic, the jury awarded plaintiff $156,500. Id.

After trial, pursuant to §537.060, RSMo, the trial court reduced the judgment to zero because the pretrial settlement was greater than the amount of the verdict. Brown, *supra* at 3. On appeal, the Court affirmed, holding that

although the clinic and the manufacturer "performed two totally separate tortious acts, the result of both of these acts was one injury to [plaintiff]. Therefore, [plaintiff] is only entitled to recover once for the injury resulting from both acts." Id.

Likewise, in this case, appellants are only entitled to recover once from the injuries caused them by respondent and the settling tortfeasors. Id. As outlined above, appellants have already received $308,855.35—the full amount awarded to them by the jury for all of their damages as stated in the verdict form (L.F. 10, 19, 21, 41-42, 79; Supp. L.F. 1-6). Therefore, they have suffered no prejudice.

Under these circumstances, appellants have failed to meet their burden to show they suffered prejudice as a result of the trial court's ruling. Thus, this claim on appeal entitles them to no relief.

D. Remaining Factors

1. Appellants Fail to Show that Respondent's Application was Untimely or that the Trial Court did not Consider the Timeliness of the Application (appellants' second factor).

Having exhausted the factors for analysis used by this Court in Crestwood, *supra*, and Green, *supra*, respondent will now turn to the two remaining factors examined by appellants. *See* Moore v. Firstar Bank, 96 S.W.3d 898, 904 (Mo. App. S.D. 2003); Lay v. P & G Health Care, Inc., 37 S.W.3d 310, 327 (Mo. App. W.D. 2000) .

The first factor is the "timeliness of the application." Moore, 96 S.W.3d at 904. Appellants argue that respondent had "many, many very easy chances….over a long period of time without any impediments" to raise §537.060, RSMo, as an affirmative defense (App. Br. 52). Appellants' argument fails—and they again fail to meet their burden under Anglim, *supra* and Boyer, *supra* to show an abuse of discretion and resulting prejudice—because there is no current requirement nor was there a requirement at the time of this trial that a party plead §537.060, RSMo, as an affirmative defense before trial. *See* Norman, 100 S.W.3d at 786.

At the time respondent's motion for leave to amend his answer to add an affirmative defense under §537.060, RSMo, was filed, there was no requirement regarding the timeliness of pleading §537.060, RSMo, as an affirmative defense (L.F. 19, 123). Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003). The issue in the first appeal in this case was the necessity of pleading a party's rights under §537.060, RSMo, as an affirmative defense. Id.

This Court's opinion in Norman, *supra*, stands for the proposition that respondent must "plead and prove the affirmative defense of reduction under section 537.060." Id. at 785-86. However, before Norman, there was no requirement that respondent plead the affirmative defense of a credit under §537.060, RSMo, before trial—nor is there such a requirement after Norman: "This Court need not decide how late a trial court may permit amendment of the pleadings in order to request a reduction under section 537.060." Id. at 786. *See*

also Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. E.D. 1999) ("A section 537.060 motion for satisfaction of judgment may be filed, considered and ruled at any time after the entry of a judgment.").

Thus, because respondent was not bound—and is not bound—by any timeliness requirements regarding filing an affirmative defense based on §537.060, RSMo, when he filed his motion for leave to amend to plead same, the trial court's ruling that granted his motion was not an abuse of discretion. Norman, *supra* at 786.

Moreover, respondent filed his motion to amend within 22 days of the earliest date he could have filed the motion. His motion for leave to amend was filed in the alternative to his motion for a reduction under §537.060, RSMo (L.F. 19, 81-95, 123-46). The earliest respondent could reasonably file a motion for a reduction is after the verdict in the case. Before then, there is no amount from which to request a reduction or from which to plead an affirmative defense of a credit under §537.060, RSMo.

In this case, the verdict was rendered on July 31, 2001; on August 7, 2001, respondent filed a motion for a reduction pursuant to §537.060, RSMo (L.F. 19, 79, 81-95). On August 22, 2001, respondent filed an alternative motion, requesting leave to amend his answer to plead §537.060, RSMo, as an affirmative defense (L.F. 19, 123-46).

Thus, within 22 days of the verdict, respondent had asked for leave to amend his answer to plead §537.060, RSMo, as an affirmative defense (L.F. 19,

79, 81-95, 123-46). Hence, because before and after Norman, *supra*, there was and is no requirement for the timeliness of pleading an affirmative defense under §537.060, RSMo, and because respondent filed his motion for leave to amend within 22 days of the verdict, the trial court's grant of respondent's motion for leave to amend was not an abuse of its discretion.

Appellants also allege that the trial court "ignored" the time issue regarding granting the motion for leave to amend (App. Br. 54). Appellants cite no facts to support this conclusion. Indeed, there is nothing in the record to show that the trial court failed to consider the timeliness issue. It is appellants' burden to show that the trial court abused its discretion. Anglim, *supra*. Because appellants cite no facts and because there are none to support their contention that the trial court failed to consider the timeliness factor in this case, appellants' claim fails.

2. Respondent's Amendment Would Unequivocally Cure the Inadequacy of the Moving Party's Pleading.

Although appellants fail to address it, the final factor addressed in appellate cases using the five factor approach to determine whether the trial court palpably and obviously abused its discretion when it permitted or denied the leave to amend pleadings is "whether an amendment could cure the inadequacy of the moving party's pleading[.]" Moore v. Firstar Bank, 96 S.W.3d 898, 904 (Mo. App. S.D. 2003). *See also* Manzer v. Sanchez, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999); Lay v. P & G Health Care, Inc., 37 S.W.3d 310, 327 (Mo. App. W.D. 2000).

Permitting respondent to amend his pleadings to add an affirmative defense under §537.060, RSMo, would cure the inadequacy of his answer. This Court's opinion in Norman, *supra*, requires litigants to plead a reduction of the verdict under §537.060, RSMo, as an affirmative defense. Norman v. Wright, 100 S.W.3d at 785. Thus, respondent's motions to amend their answer to plead §537.060, RSMo, as an affirmative defense—22 days after the verdict in August 2001 and nine days after the holding in Norman v. Wright was handed down in March 2003—would completely cure any defect present in respondent's pleadings regarding his rights under §537.060, RSMo (L.F. 18-19, 21, 79, 123-46, 172-82).

Appellants offer no argument to the contrary and therefore fail, as they did in the preceding factors, to show that the trial court obviously and palpably abused its discretion. As a result of their failure to meet their burden, their claim on appeal entitles them to no relief. Anglim, *supra*; Boyer, *supra*.

3. If this Court Affirmed the Trial Court's Ruling, it would not Change the Pending Claims or Adversely Affect Public Policy.

Appellants offer a fifth factor in their brief regarding whether the grant or denial of a motion for leave to amend would change the pending claims (App. Br. 56). Respondent can locate no authority for the inclusion of this factor, but will address it out of an abundance of caution.

Appellants claim that respondent's "amended answer changed the pending claims significantly" (App. Br. 56). As previously mentioned, appellants claim that if respondent had affirmatively pled §537.060, RSMo, as a defense before

trial, they were prepared to "trump" respondent's request with their own request for apportionment of fault under §538.230, RSMo (App. Br. 56-57).

They further argue that because respondent did not request leave to amend to plead his rights under §537.060, RSMo, until after trial, he took the "fact issue of apportionment of fault away from the jury and den[ied] [appellants'] their statutory right to have apportionment of fault submitted as provided in Section 538.230, RSMo" (App. Br. 57).

Appellants' cite no authority for their contention that respondent's failure to plead §537.060, RSMo, before trial denied them the ability to request that the trial court instruct the jury regarding apportionment of fault under §538.230, RSMo (App. Br. 56-57). "Where an appellant neither cites relevant authority in support of its position, nor offers an explanation for why none is available, an appellate court is justified in considering the point abandoned." Schubert v. Trailmobile Trailer, L.L.C., 111 S.W.3d 897, 906 (Mo. App. S.D. 2003). *See also* Thummel v. King, 570 S.W.2d 679, 687 (Mo. banc 1978).

Thus, this claim has been abandoned and should not be reviewed.

Should this Court choose to review this claim, it will find it legally and factually unsupportable. Section 538.230, RSMo, is unambiguous:

> In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court,

unless otherwise agreed by all the parties, **shall instruct the jury to apportion fault** among such persons and parties. (emphasis added).

Thus, unless the parties agree, the imposition of the provisions of §538.230, RSMo, regarding apportionment of fault is mandatory, provided the parties adduce evidence to support same. *See* Vincent by Vincent v. Johnson, 833 S.W.2d 859, 863 (Mo. banc 1992) (the court held that "[t]he remaining provisions of §538.230 make apportionment by the jury automatic unless otherwise agreed by all the parties.") *But see* Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 569 (Mo. App. E.D. 2002) (the court found that, although the defendant requested its application, §538.230, RSMo, was inapplicable where tortfeasor doctor was agent of tortfeasor hospital).

In this case, the parties agreed to waive the application of §538.230, RSMo, so the trial court was not required to apply its provisions. Norman, 100 S.W.3d at 785. However, in the absence of such an agreement, as well as other circumstances not applicable herein, Scott, *supra*, the application of §538.230, is "automatic." Vincent, 833 S.W.2d at 863.

Moreover, appellants' argument fails because they cite no facts supporting their claim that they were barred from asking for apportionment of fault under §538.230, RSMo, unless or until respondent asked for a reduction under §537.060, RSMo. Regardless of respondent's pleadings or his pre-trial posture, appellants could have requested apportionment of fault at any time before trial. Section 538.230, RSMo. *See* Adams by Ridgell v. Children's Mercy Hosp., 848 S.W.2d

535, 539 (Mo. App. W.D. 1993) *abrogated on other grounds by* Washington by Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. banc 1995) (the Adams court affirmed the trial court's ruling that granted defendants leave to amend the pleadings to apportion fault under §538.230, RSMo, as late as the pretrial conference).

Appellants' contention that they would have "trumped" respondent's attempt to plead his rights under §537.060, RSMo, with a request under §538.230, RSMo, for apportionment of fault causes their argument to collapse: if a request under §538.230, RSMo, "trumps" a motion for a reduction under §537.060, RSMo, then such a request can be filed at anytime before trial. Section 538.230, RSMo. Adams, *supra*. Further, appellants admit in their brief that "absent an agreement, either side has carte blanche power to force the court to submit apportionment to the jury" (App. Br. 34-36).

Thus, appellants could have asked for apportionment of fault under §538.230, RSMo, anytime before trial. Adams, *supra*. Their request was not dependent on respondent's pleading of defenses under §537.060, RSMo. They cite no authority in law or fact indicating that they were barred from asking for apportionment of fault under §538.230, RSMo, unless or until respondent asked for a reduction under §537.060, RSMo. Thus, their claim fails and entitles them to no relief on appeal.

Moreover, appellants' reliance on Boling v. State Farm Mutual Auto. Ins. Co., 466 S.W.2d 696 (Mo. banc 1971) is misplaced. Appellants cite Boling for the

notion that the trial court did not abuse its discretion when it denied a defendant leave to add an additional defense a month before trial when it knew of facts supporting that defense six months before trial (App. Br. 57).

Boling is inapposite because the facts in the present case giving rise to an affirmative defense under §537.060, RSMo, were known by appellants at the same time they were known by respondent, if not before they were known by respondent. The first fact giving rise to such a defense is the $100,000 pre-trial settlement (L.F. 10, 41-42). As a party to the settlement, appellants requested and attended the hearing where the trial court approved of their settlement so they knew about that fact when it occurred (L.F. 10, 41-42). Respondent discovered the settlement in due course (L.F. 43).

The second fact giving rise to a defense or request for credit under §537.060, RSMo, was known by both parties simultaneously when the verdict was rendered and there was an amount from which respondent could seek a credit (L.F. 18-19, 79). Thus, Boling is inapposite since the facts giving rise to respondent's affirmative defense were known to the parties both well in advance of trial—the settlement—and simultaneously when the verdict was rendered (L.F. 10, 18-19, 41-42, 79).

Moreover, appellants' failure to request apportionment under §538.230, RSMo, was a matter of either inadvertence or trial strategy. If the latter, then appellants consciously concluded they would reap no benefit from apportionment

and decided not to request it. Thus, their pre-trial strategy was a result of their own planning and not respondent's pleadings.

Under these circumstances, appellants' argument that respondent's after-trial motion for leave to amend "completely alter[ed] the pending claims and evidence" fails as a matter of law and a matter of fact.

Appellants' final argument under their first point is based on alleged public policy considerations (App. Br. 58-60). Appellants' argument in this section is somewhat indecipherable because the statute numbers appear to be transposed (App. Br. 58-60).

However, appellants appear to argue that if this Court affirms the trial court's ruling, it will permit future defendants to request apportionment of fault under §538.230, RSMo, before trial and then, if not satisfied with the outcome, they can and will ask for a credit after trial under §537.060, RSMo (App. Br. 58).

This argument fails because it relies on facts not present in this case. In this case, apportionment of fault under §538.230, RSMo, was waived before trial. Norman v. Wright, 100 S.W.3d 783, 784 (Mo. banc 2003). So if this Court affirms the trial court's ruling, such a holding will not permit future litigants to ask for apportionment under §538.230, RSMo, at trial and then ask for a credit under §537.060, RSMo after trial.

Appellants also appear to argue that if this Court affirms the trial court's ruling, then a party in the future would be able to request apportionment of fault under §538.230, RSMo, after the conclusion of trial (App. Br. 58). Appellants

admit that such a scenario is "absurd" and "ridiculously impossible" (L.F. 192, 205). Indeed, there is no possible legal or factual way for the jury to apportion fault under §538.230, RSMo, after it has been discharged from the trial. Such a scenario is factually and legally impossible regardless of this Court's decision in this case.

As repeatedly mentioned above, appellants' claims under this point utterly fail to meet their burden of proof to show an abuse of discretion and resulting prejudice under Anglim v. Missouri Pacific R. Co., 832 S.W.2d 298, 303 (Mo. banc 1992) ("the appellant bears the burden of showing an abuse of discretion.") *See also* Boyer v. Sinclair & Rush, Inc., 67 S.W.3d 627, 634 (Mo. App. E.D. 2002) ("A ruling within the trial court's discretion is presumed correct and the appellant bears the burden of showing the trial court abused its discretion and that they have been prejudiced by the abuse."); KC Excavating and Grading, Inc. v. Crane Const. Co., 141 S.W.3d 401, 408 (Mo. App. W.D. 2004) ("It is the appellant's burden to persuade us that the circuit court abused its discretion and that the abuse resulted in prejudice.").

Under these circumstances, this point on appeal entitles appellants to no relief.

Point II

Trial court did not obviously and palpably abuse its discretion when it granted respondent's motion for leave to amend his answer because

a) respondent's actions did not deny appellants their right to request apportionment of fault under §538.230, RSMo, and

b) respondent was unable to appeal the denial of his first motion for leave to amend his answer because such an appeal would have been moot and because respondent was not an aggrieved party.

Further, this Court should not review appellants' contentions regarding the law of the case doctrine since they did not include it in their appellate brief to the Court of Appeals and did not raise it in the trial court. In any event, the law of the case doctrine does not apply to this case.

In their second point on appeal, appellants claim that the trial court erred when it sustained respondent's motion for leave to amend his answer (App. Br. 22-23, 61-62). Appellants imply that the trial court erred because respondent failed in two respects: first, appellants contend that respondent failed to offer his motion to amend his answer before the jury was discharged, and second, respondent failed to appeal the denial of that motion (App. Br. 22-23, 61-62). Generally, each point relied on should contain only one issue. *See* Rule 84.04(d) and Thummel v. King, 570 S.W.2d 679, 688 (Mo. banc 1978).

A. Standard of Review

As with the previous point, appellants' claim ultimately rests on a challenge of the trial court's exercise of its discretion, so the standard of review is: whether to grant or deny "leave to amend is within the sound discretion of the trial court, and its decision will not be disturbed unless there is a showing that such court palpably and obviously abused its discretion." Moore v. Firstar Bank, 96 S.W.3d 898, 903 (Mo. App. S.D. 2003). *See also*, Dye v. Division of Child Support Enforcement, Dept. of Social Services, State of Mo. *supra* at 358.

As previously mentioned, "[j]udicial discretion is abused when the court's ruling is clearly against the logic of the circumstances presented to the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." Moore, *supra* at 903-04; Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo. banc 2000).

Moreover, and most importantly, this Court presumes that the trial court's ruling is correct and appellants must show both that the trial court abused its discretion and that they suffered prejudice as a result. Anglim v. Missouri Pacific R. Co., 832 S.W.2d 298, 303 (Mo. banc 1992) ("the appellant bears the burden of showing an abuse of discretion.") *See also* Boyer v. Sinclair & Rush, Inc., 67 S.W.3d 627, 634 (Mo. App. E.D. 2002) ("A ruling within the trial court's discretion is presumed correct and the appellant bears the burden of showing the trial court abused its discretion and that they have been prejudiced by the abuse."); KC Excavating and Grading, Inc. v. Crane Const. Co., 141 S.W.3d 401, 408 (Mo.

App. W.D. 2004) ("It is the appellant's burden to persuade us that the circuit court abused its discretion and that the abuse resulted in prejudice.").

B. Factual Background

As previously recited, this suit commenced on February 14, 1997, when plaintiffs filed their petition in this action. (L.F. 2, 24-39). The jury trial concluded on July 31, 2001, with a verdict in favor of appellants for $308,855.35 (L.F. 19, 79). A week after trial, on August 7, 2001, respondent filed a motion, pursuant to §537.060, RSMo, requesting a reduction of the verdict in the amount of the $100,000 pretrial settlement (L.F. 19, 81-95). Fifteen days later, on August 22, 2001, respondent filed an alternative motion, requesting leave to amend his answer to plead the affirmative defense of §537.060, RSMo, and gain a $100,000 reduction of the verdict (L.F. 19, 123-46).

After two hearings on these motions, including "extensive" oral argument on respondent's motion for leave to amend his answer, the trial court denied respondent's motion to amend his answer and granted his alternative motion for a reduction of the verdict pursuant to §537.060, RSMo (L.F. 19-20). In granting respondent's motion for a reduction of the verdict, the trial court granted respondent the relief he requested in his alternative motion for leave to amend his answer—a $100,000 reduction of the judgment (L.F. 19, 81-95, 123-46).

Over eighteen months later, on March 27, 2003, after this Court's opinion in Norman v. Wright, 100 S.W.3d 783, 786 (Mo. banc 2003), required that §537.060, RSMo, be pleaded as an affirmative defense, respondent filed a second

motion for leave to file an amended answer to plead §537.060, RSMo, as an affirmative defense (L.F. 21, 177-82). Id. at 786.

The trial court entered its judgment granting respondent's motion for leave to amend his answer to include §537.060, RSMo, as an affirmative defense on July 30, 2003 (L.F. 22, 194, 712-13).

C. Neither the Trial Court's Ruling Nor Respondent's Pleadings Deprived Appellants of the Opportunity to Request Apportionment under §538.230, RSMo.

As noted above, appellants make two distinct claims under this point, the first of which is that they were denied "their right to possibly invoke the provisions of Section 538.230 R.S.Mo for a decision by the same jury" because respondent did not file his motion for leave to amend his answer until after trial (App. Br. 22-23, 61-62).

Appellants never argue, reiterate or mention this claim in their argument section under this point in their brief, in violation of Rule 84.04 (App. Br. 61-71). "Where a party fails to support a contention with relevant authority or argument beyond conclusions, the point is considered abandoned." Beatty v. State Tax Com'n, 912 S.W.2d 492, 498-99 (Mo. banc 1995). *See also* Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 824 (Mo. banc 2000) (This Court deemed abandoned an argument that was not referenced by a party in the argument section of its brief), and Thummel v. King, 570 S.W.2d 679, 686-87 (Mo. banc 1978).

As a result of appellants' failure to argue this claim in the argument section of their brief, this Court should consider this portion of their Point Relied On abandoned.

Should this Court choose to review this claim, it will find that it is a regurgitation of a part of appellants' argument in their first point on appeal, where they argue under their fifth factor that had respondent amended his answer before trial asking for relief under §537.060, RSMo, appellants would have "trumped" that request with a request for apportionment of fault under §538.230, RSMo (App. Br. 56-57). Appellants contend here, point two, as they contended in point one, that they were "denied their right" to ask for apportionment of fault under §538.230, RSMo (App. Br. 22-23, 48-49, 56-57).

As respondent noted in response to this argument in point one, *supra*, appellants cite no authority for the proposition that they were somehow barred from asking for apportionment of fault under §538.230, RSMo (App. Br. 52-54, 56-61). Thus, appellants not only fail to include this claim in their argument section under their point two, but when they argue it under point one, they fail to cite any supporting authority (App Br. 56-57).

As respondent stated in point one, *supra*: "[w]here an appellant neither cites relevant authority in support of its position, nor offers an explanation for why none is available, an appellate court is justified in considering the point abandoned." Schubert v. Trailmobile Trailer, L.L.C., 111 S.W.3d 897, 906 (Mo. App. S.D. 2003). *See also* Thummel v. King, 570 S.W.2d 679, 687 (Mo. banc 1978).

Thus, because appellants fail to include this claim in their argument section in point two and because when they argue it under point one, they fail to include any supporting authority, this Court should deem this point abandoned and not review it.

Should this court choose to review it, this Court will find it without merit. As respondent stated in point one, *supra*, the provisions of §538.230, RSMo, are mandatory: the trial court "shall instruct the jury to apportion fault among such persons and parties." Further, §538.230, RSMo, "make[s] apportionment by the jury automatic unless otherwise agreed by all the parties." Vincent by Vincent v. Johnson, 833 S.W.2d 859, 863 (Mo. banc 1992). *But see* Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 569 (Mo. App. E.D. 2002).

Thus, appellants could have requested apportionment of fault before trial and had they adduced the proper evidence against respondent and the settling defendants, the trial court would have been required to instruct the jury to apportion fault between them. Section 538.230, RSMo.

As a result, appellants' argument that they were barred from invoking the provisions of §538.230, RSMo, because respondent did not plead his rights under §537.060, RSMo, fails as a matter of law.

Thus, because appellants fail to mention this claim in their argument under point two, because they fail to cite any authority supporting this claim when they do include in under point one, and because it is wholly without merit, this claim entitles them to no relief on appeal.

D. The Trial Court is not Barred from Granting Respondent's Motion for Leave to Amend Because Respondent was Unable to Appeal the Trial Court's Initial Denial of His Motion for Leave to Amend his Answer.

Appellants next claim that respondent is not entitled to relief from the trial court on his motion to amend his answer because he failed to appeal the trial court's denial of his first motion to amend his answer (App. Br. 22-23, 61-71).

As noted above, immediately following trial, respondent filed a motion for leave to amend his answer to plead §537.060, RSMo, as an affirmative defense (L.F. 19, 123-46). The trial court denied this motion (L.F. 19-20). Simultaneously, the trial court granted respondent's motion for a reduction under §537.060, RSMo, and reduced the jury's verdict by $100,000 (L.F. 19, 81-95, 123-46).

Appellants now claim that respondent should have appealed the trial court's denial of his motion for leave to amend his answer to include §537.060, RSMo, as an affirmative defense (App. Br. 22-23, 61-71). Appellants' claim has no merit because respondent could not have properly brought an appeal from the trial court's denial of his first motion for leave to amend because respondent was not an aggrieved party and such an appeal would have been moot. Section 512.020, RSMo; Wright v. Rankin, 109 S.W.3d 696, 699 (Mo. App. S.D. 2003); State ex rel. Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. banc 2001).

An issue is moot "when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have

any practical effect upon any then existing controversy." State ex rel. Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. banc 2001); Kinsky v. Steiger, 109 S.W.3d 194, 95 (Mo. App. E.D. 2003); Meco Systems, Inc. v. Dancing Bear Entertainment, Inc., 42 S.W.3d 794, 809 (Mo. App. S.D. 2001). Moot appeals are properly dismissed. Shaw v. Ferguson Medical Group, L.P., 121 S.W.3d 557, 558 (Mo. App. E.D. 2003); Brown v. Moore, 126 S.W.3d 465 (Mo .App. W.D. 2004).

In this case, an appeal from the trial court's denial of respondent's first motion to amend would have been moot because the trial court already granted respondent the relief he sought by granting his motion for a reduction under §537.060, RSMo (L.F. 19, 81-95, 123-46).

In both motions—the motion for leave to amend to amend his answer and the motion to reduce the jury's verdict under §537.060, RSMo—respondent sought a $100,000 settlement credit against the judgment of $308,855.35 (L.F. 19, 81-95, 123-46).

In his motion for a reduction of the jury verdict in the amount of $100,000—under §537.060, RSMo—respondent explicitly asked the court to subtract the $100,000 pretrial settlement from the verdict of $308,855.35 (L.F. 81-95). In his motion for leave to amend his answer, respondent requested leave to amend his answer to plead §537.060, RSMo, as an affirmative defense, thereby decreasing the $308,855.35 verdict by the amount of the $100,000 pretrial settlement (L.F. 123-46).

When the trial court granted respondent's reduction for a verdict, it granted him the ultimate relief he sought under both motions (L.F. 19-20, 81-95, 123-46, 147-49). As a result, an appeal from the trial court's denial of respondent's motion for leave to amend would have been moot because respondent obtained the relief he requested and the intervention of an appellate court would have had no "practical effect upon any existing controversy." State ex rel. Reed v. Reardon, 41 S.W.3d at 473.

Thus, because an appeal from the denial of respondent's first motion to amend would have been moot, this point on appeal fails and entitles appellants to no relief.

Moreover, respondent would have been barred from appealing the trial court's denial of his motion to amend since he was not an aggrieved party. Missouri law is well-established that appealing parties be aggrieved parties. *See* Transit Cas. Co. ex rel. Pulitzer Publishing Co. v. Transit Cas. Co. ex rel. Intervening Employees, 43 S.W.3d 293, 297 (Mo. banc 2001); Shelter Mut. Ins. Co. v. Briggs, 793 S.W.2d 862, 863 (Mo. banc 1990); s*ee also* §512.020, RSMo.

"A party is aggrieved when the judgment operates prejudicially and directly on his or her personal or property rights or interest and such is an immediate and not merely a possible, remote consequence." Lett v. City of St. Louis, 24 S.W.3d 157, 160 (Mo. App. E.D. 2000); Wright v. Rankin, 109 S.W.3d 696, 699 (Mo. App. S.D. 2003).

After the trial court granted respondent's motion for a reduction, he was no longer subject to a judgment that operated "prejudicially or directly on his personal or property rights" because he obtained the reduction of the verdict he sought in his motion to amend when the trial court granted his motion for a reduction under §537.060, RSMo. Rankin, *supra*.

As a result, although the trial court denied his motion to amend, respondent was no longer an aggrieved party and was therefore unable to appeal the trial court's denial of his motion to amend. Id.

E. This Court Should Not Review Appellants' Contentions Regarding the Law of the Case Doctrine Since Appellants did not Include those Claims in their Brief in the Court of Appeals, Nor did They Bring this Issue to the Trial Court's Attention; In Any Event, the Law of the Case Doctrine Does Not Apply.

In the argument section of their brief, appellants claim that the law of the case doctrine applies to bar the trial court from granting respondent's motion for leave to amend his answer (App. Br. 62-65). Appellants claim that the law of the case doctrine applies because respondent did not appeal the trial court's initial denial of his motion for leave to amend filed immediately after trial (App. Br. 62-65).

Appellants have failed to include any reference in their Point Relied On to their argument regarding the application of the law of the case doctrine to the trial court's decision in this case in violation of Rule 84.04(d). This Court does not review issues raised for the first time in the argument section. *See* Berger v.

Huser, 498 S.W.2d 536, 539 (Mo. 1973); and In re Marriage of Thomas, 21 S.W.3d 168, 173 (Mo. App. S.D. 2000) ("Appellate courts are obliged to decide only those issues raised in points relied on").

Further, appellants never brought the applicability of the law of the case doctrine to the trial court's attention. State ex rel Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 129 (Mo. banc 2000) ("[a]n issue that was never presented to or decided by the trial court is not preserved for appellate review.").

Nor did appellants include it in their brief submitted to the Missouri Court of Appeals, Southern District, in the appeal below, No. SD25818. "On transfer to this Court, appellants may not add new claims." Dupree v. Zenith Goldline Pharmaceuticals, Inc., 63 S.W.3d 220, 222 (Mo. banc 2002); Blackstock v. Kohn, 994 S.W.2d 947, 953 (Mo. banc 1999); *see also* Rule 83.07(b).

Under these circumstances this Court should not review appellants' claim regarding the applicability of the law of the case doctrine.

Should this Court review this claim, it will find it without merit.

Appellants' contention regarding the law of the case is meritless because there is no law of the case in this matter. Giddens v. Kansas City Southern Ry. Co., 29 S.W.3d 813, 824 (Mo. banc 2000). "The general rule is that the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not." Id.

In this case, no appellate court has ever addressed the propriety of the trial court's ruling that granted respondent's motion for leave to amend his answer, let alone ruled that the trial court could not grant that motion.[1]

The crux of appellants' claim regarding the law of the case doctrine mirrors the holding of the Southern District Court of Appeals in Norman v. Wright, No. SD25818, Slip Op. (Mo. App. S.D. May 26, 2004) (App. Br. 63-66). Appellants claim that "[a] prior decision on the same issue becomes the law of the case as to all questions directly raised and passed upon and on all matters that arose before the first appeal that might have been raised but were not" (App. Br. 63).

The fatal flaw in this argument is that this issue was never raised on appeal and could not have been—as explained above, respondent could not have appealed from the trial court's denial of his first motion for leave to amend his answer because he was not an aggrieved party and such an appeal would have been moot. Reardon, *supra*, Transit Cas. Co., *supra*.

As a result, there is no law of the case in this matter—not only has this issue has never been raised on appeal, but it could not have been. Therefore, there

[1]Of course, the Southern District's most recent opinion squarely addresses this issue—Norman v. Wright, No. SD25818, Slip Op. (Mo. App. S.D. May 26, 2004)—but that opinion is a nullity since this Court granted transfer. Rule 83.09. *See* Gerlach v. Missouri Com'n on Human Rights, 980 S.W.2d 589, 594 (Mo. App. E.D. 1998).

is no law of the case and appellants' invocation of the law of the case doctrine is meritless.

Not only has no appellate court ever addressed this issue, but the law of the case doctrine does not apply in situations where parties raise new issues in their pleadings following remand. M & H Enterprises v. Tri-State Delta Chemicals, Inc., 35 S.W.3d 899, 905 (Mo. App. S.D. 2001) ("The law of the case doctrine, however, does not apply to new issues introduced following remand by amended pleadings"); State ex rel. Mercantile Nat. Bank at Dallas v. Rooney, 402 S.W.2d 354, 361 (Mo. banc 1966) ("Generally, the law as applied to the facts in the opinion of the appellate court constitutes the law of the case on retrial and subsequent appeals unless there is a substantial change in the issues or evidence").

When respondent filed his second motion to amend, he relied on this Court's first opinion in this case, which had dramatically changed the nature of the case (L.F. 21, 177-89). M & H Enterprises, *supra*.

Respondent's first motion to amend his answer, filed on August 23, 2001, three weeks and two days after trial, was based on the language found in the release granted to the settling defendants by plaintiffs as well as the language of §537.060, RSMo (L.F. 123-27, 141-46).

However, respondent's second motion for leave to amend—titled Respondent's Motion for Leave to File an Amended Answer to Plaintiff's Second Amended Petition for Damages, Subsequent to the Missouri Supreme Court's Opinion in This Action Having Been Handed Down on March 18, 2003—raised

new issues that were not raised in Respondent's first motion to amend (L.F. 21, 177-89).

This motion, filed by defendant nine days after this Court's opinion in Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003), argued that based on the Court's ruling in Norman, the trial court could allow Respondent to amend his answer to plead §537.060, RSMo, as an affirmative defense (L.F. 21, 177-89).

Thus, respondent's motion to amend filed after this Court's opinion raised new issues—this Court's opinion in Norman, *supra*. As a result, the law of the case doctrine does not apply in this case since respondent introduced new issues in amended pleadings. M & H Enterprises, *supra*.

Appellants claim that this exception to the law of the case doctrine does not apply in this case because it is only meant for "instances where the situation changed such as if there was either no trial before the appeal, or after the appeal at the request of one party the case was remanded for trial" (App. Br. 64). As with some of appellants' other assertions, this one is unsupported by authority and should be ignored by this Court. Thummel, *supra*.

In any event, this contention has no merit because whether or not a trial was held does not prevent a party from raising new issues in pleadings, prohibiting the application of the law of the case doctrine. M & H Enterprises, *supra*.

Appellants continue their contention that the law of the case doctrine does not apply because respondent did not raise a new issue in his pleadings (App. Br. 65). Appellants claim that this Court's opinion in Norman v. Wright, 100 S.W.3d

783 (Mo. banc 2003) was "certainly far from new or changed" (App. Br. 65). Yet, they admit that Norman was a ruling "never before specifically addressed upon these precise facts" and it was "merely the application of 'old law' to 'new facts'" (App. Br. 66).

Indeed, this Court's opinion was a new issue—appellants even admit it was the application of law to new facts (App. Br. 66). Norman, *supra*. Further, Norman constituted a new issue because it overruled Julien, *supra*. Therefore, it was a new issue interjected into the case by respondent in his second motion for leave to amend his answer, and bars the application of the law of the case doctrine (L.F. 21, 177-89). M & H Enterprises, *supra*.

Appellants also claim that respondent's reliance on Julien v. St. Louis University, 10 S.W.3d 150 (Mo. App. E.D. 1999) is not legitimate because respondent did not cite this case in one motion (App. Br. 67). Appellants further claim that Julien is inapplicable to this case (App. Br. 67). However, as mentioned above, Julien specifically stated that a motion under §537.060, RSMo, may be granted after judgment is entered. Id. at 152. Appellants contentions therefore fail.

The third reason the law of the case doctrine does not apply in this case is that it does not apply in situations where an appellate court has reversed the trial court's judgment rendering it a nullity. Century Fire Sprinklers, Inc. v. CNA/Transportation Ins. Co., 87 S.W.3d 408, 423 (Mo. App. W.D. 2002) (the law of the case doctrine does not apply when the appellate court reverses the trial

court's judgment); Serafin v. Med 90, Inc., 963 S.W.2d 362, 363 (Mo. App. E.D. 1998).

In this case, this Court's first opinion reversed the trial court's judgment: "After opinion by the Court of Appeals, this Court granted transfer. *Mo. Const. art. V, sec. 10.* Reversed and remanded." Norman v. Wright, 100 S.W.3d 783, 784 (Mo. banc 2003). As a result, according to this Court's opinion in Century, *supra*, the law of the case does not apply.

Appellants cite three cases in support of their observation that respondent should have used the "important tool" of cross-appeal: Nusbaum v. City of Kansas City, 100 S.W.3d 101 (Mo. banc 2003); Sanders v. Hartville Mill. Co., 14 S.W.3d 188, 215 (Mo. App. S.D. 2000); Shady Valley Park & Pool, Inc. v. Fred Weber, Inc., 913 S.W.2d 28, 33 (Mo. App. E.D. 1995) (App. Br. 63, 66).

As outlined below, all three are factually inapposite since in each case, the lower court's judgment rendered the cross-appealing party an aggrieved party by "operat[ing] prejudicially and directly on [the party's] personal or property rights or interest [in] an immediate and not merely a possible, remote consequence." Lett, 24 S.W.3d at 160.

In Nusbaum v. City of Kansas City, 100 S.W.3d 101 (Mo. banc 2003), a patron of the Starlight Theatre in Kansas City fell on the sidewalk near the theatre and sued the City of Kansas City, the theatre and, J.E. Dunn Construction, the general contractor performing work around the area where the patron fell. Id. at

102. The general contractor filed a third party cross-claim against a subcontractor, PC Contractors. Id. at 103.

The trial court ruled against Dunn, the general contractor, requiring it to indemnify the theatre for its settlement and expenses in defending the suit, according to the written contract between them. Id. at 105. The trial court also ruled that the subcontractor, PC, had to indemnify the general contractor for its expenses, according to their contract. Id. On appeal, the general contractor, Dunn, provisionally cross-appealed the trial court's ruling against it and in favor of the theatre for indemnification. Id. at 102, 108.

This case does not support appellant's position because, although Dunn's appeal was "provisional" it was appealing from a judgment against it. Id. at 105. Thus, it was an aggrieved party. Lett, *supra*. In this case, respondent had received the relief he sought and had no adverse judgment from which to cross-appeal, as appellants suggest he should have (App. Br. 63-66; L.F. 147-49).

Further, in Sanders v. Hartville Mill. Co., 14 S.W.3d 188, 215 (Mo. App. S.D. 2000), the plaintiff farmer sued a feed mill, Hartville Mill Co., for selling cattle feed containing toxins as well as Cargill, the mill's supplier. Id. at 192-93. The trial court granted summary judgment against plaintiffs on some of its counts against Hartville and all of its counts against Cargill. Id. at 192.

After trial on the remaining counts against Hartville, the jury awarded the plaintiffs $402,000 due to Hartville's provision of the toxic cattle feed. Id. at 202.

The plaintiffs cross-appealed the trial court's ruling of summary judgment against them. Id. at 191.

The Plaintiffs cross-appealed those rulings and agreed to pursue their appeal only if the jury verdict was not upheld. Id. at 192, 215. Even though the plaintiffs' cross-appeal was "provisional," the trial court's grant of summary judgment was a judgment that was reviewable *de novo* by an appellate court. Loeffler v. City of O'Fallon, 71 S.W.3d 638, 639 (Mo. App. E.D. 2002). That judgment against plaintiffs aggrieved them because it excised an entire defendant from the case—Cargill—as well as removing nine of eleven counts against the remaining defendant—Hartville. Sanders, *supra* at 192. Thus, the trial court's judgment "operated prejudicially and directly on [the party's]…rights" Lett, *supra*. Sanders is inapposite because in the instant case there was no judgment against respondent from which to appeal.

In Shady Valley Park & Pool, Inc. v. Fred Weber, Inc., 913 S.W.2d 28, 33 (Mo. App. E.D. 1995), a case where a highway construction firm permitted silt and drainage to ruin the operations of a fish-breeding and wholesale operation, the plaintiffs cross-appealed when the trial court directed the verdict against them. Id. at 30, 36. Although the plaintiffs were awarded $3 million at trial, the trial court directed a verdict for punitive damages against them. Id.

Shady Valley is also inapposite to this case because a directed verdict for punitive damages removes an entire category of damages from plaintiff's claims, rendering the plaintiffs aggrieved parties. Lett, *supra*. In the case at bar, however,

although the trial court denied respondent's motion to amend his answer, it granted him the relief he sought—the $100,000 reduction of the jury's verdict (L.F. 147-49).

Appellants' reliance on Williams v. Casualty Reciprocal Exchange, 929 S.W.2d 802, 809-10 (Mo. App. W.D. 1996) is also misplaced. In Williams, the plaintiff was injured by an uninsured motorist while the plaintiff was in the course and scope of his employment. Id. at 803-04. The plaintiff won a workers' compensation award in the amount of $35,799.55 and also sued his employer's uninsured motorist insurance carrier and won $40,000 after a jury trial. Id. at 804. Pursuant to language in its insurance policy, the insurance carrier asked for a reduction of the jury verdict by the amount of the workers' compensation award. Id. at 808.

The Court of Appeals, held that the policy provision requiring such an offset was prohibited by public policy and that the insurance carrier was not entitled to a full setoff pursuant to its policy. Id. at 809. The court permitted an offset above the $25,000 threshold for uninsured motorist coverage. Id.

Williams is inapposite because it has nothing to do with amending pleadings or the timeliness of such amendments. Id. Furthermore, its holding is premised on the policy implications and enforceability of a provision in an insurance contract—i.e. a private contract between two parties. Id. In the present case, the issue hinges on the timeliness of a motion to amend an answer to plead rights under a Missouri statute—§537.060, RSMo. Thus, Williams is inapposite

because it does not mention this statute, nor does it speak to timeliness of amendments, nor does it have relevant facts.

Hence, for the reasons stated above, including respondent's inability to appeal the trial court's denial of his first motion for leave to amend his answer, the inapplicability of the case doctrine and appellants' failure to reiterate assertions in their argument section and Point Relied On, appellants' claims under this point entitle them to no relief.

Point III

This Court should decline to review appellants' claim that principles of statutory construction preclude the application of §537.060, RSMo, to this case because this argument was never presented to the trial court. If this Court chooses to review this claim, it is reviewable for plain error only, and this Court will find that this claim is directly contradicted by this Court's previous opinion in this case.

Moreover, this Court should consider abandoned appellants' claim that respondent is bound to the provisions of §538.230, RSMo, because appellants cite no authority for their claim.

If this Court chooses to review this claim, it will find that respondent is not bound to the provisions of §538.230, RSMo, because the statute provides that apportionment of fault does not apply when all parties agree in that the parties at trial agreed to waive their rights to apportionment of fault under this statute.

Appellants' final point on appeal is that the trial court erred when it sustained respondent's motion to amend his pleadings to plead an affirmative defense under §537.060, RSMo (App. Br. 24-25, 72-73). They specifically contend that, under principles of statutory construction, §538.230, RSMo, applies to health care providers to the exclusion of §537.060, RSMo (App. Br. 24-25, 72-79). They also claim that respondent "directly bound himself" to the provisions of

§538.230, RSMo, and cannot waive that statute and proceed under §537.060, RSMo (App. Br. 24-25, 72-73, 79-81).

A. Appellants' Statutory Construction Claim Should Not be Reviewed Because it was Never Presented to the Trial Court. In Any Event, it is Meritless Because of This Court's Holding in Norman v. Wright, *100 S.W.3d 783 (Mo. banc 2003).*

This Court should not review appellants' statutory construction claim that §537.060, RSMo, does not apply to health care providers since it is superseded by the provisions of §538.230, RSMo, because this claim was never presented to the trial court and is raised for the first time on appeal.[2]

Missouri law is well-settled that "[i]ssues raised for the first time on appeal are not preserved for review." Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 462 (Mo. banc 1998); State ex rel Nixon v. American Tobacco Co., Inc., 34 S.W.3d 122, 129 (Mo. banc 2000) ("[a]n issue that was never presented to or decided by the trial court is not preserved for appellate review.");

[2]A review of the Legal File reveals no pleading or correspondence where appellants brought this statutory construction issue to the trial court's attention, including their motion for a new trial (L.F. 166-68) or their motion for reconsideration (L.F. 202-06). Indeed, the portion of the argument section of appellants' brief that supports this contention—page 73 through the second paragraph on page 79—contains no citations to the Legal File. *See* Rule 84.04(i).

SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP, 128 S.W.3d 534, 541 (Mo. App. E.D. 2003) ("We shall not convict the trial court of error when it is unclear whether the issue was unequivocally brought to the attention of the trial court."); s*ee* Rule 84.13(a).

Should this Court choose to review this claim, it is reviewable for plain error only. Rule 84.13. State v. Nunley, 992 S.W.2d 892, 895 (Mo. App. S.D. 1999). *See also* Mitchem v. Gabbert, 31 S.W.3d 538, 541 (Mo. App. S.D. 2000). Plain error relief is rarely granted in civil cases. McConnell v. Stallings, 955 S.W.2d 590, 593 (Mo. App. S.D. 1997); Davolt v. Highland, 119 S.W.3d 118, 135 (Mo. App. W.D. 2003).

If this Court conducts plain error review, it will find that appellants' argument that §538.230, RSMo, supersedes §537.060, RSMo, because §538.230, RSMo, is a more specific statute enacted later in time fails because of this Court's holding in Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003) (App. Br. 64):

> **Section 537.060 applies to all tort actions.** Section 538.230, discussed above, applies *only* to tort actions based on improper health care. The General Assembly specifically lists certain sections of chapter 537 that do "not apply" to improper -health- care torts. Section 537.060 is not listed. **Thus, if all the parties agree not to apportion fault under section 538.230, section 537.060 applies.** (emphasis added).

Id. at 785. *See also* Glidewell v. S.C. Management, Inc., 923 S.W.2d 940, 959 (Mo. App. S.D. 1996) (this Court found that §537.060, RSMo, applied to the exclusion of §538.230, RSMo, in a case involving health care providers); SSM Health Care St. Louis v. Radiologic Imaging Consultants, LLP, 128 S.W.3d 534, 538 (Mo. App. E.D. 2003); Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560, 569 (Mo. App. E.D. 2002).

Further, this ruling by this Court has become the law of the case—§537.060, RSMo, applies to healthcare providers because this Court has so ruled in a previous opinion in this very case. *See* Giddens, *supra* at 824: "The general rule is that the decision of a court is the law of the case for all points presented and decided[.]" As quoted above, this issue regarding the applicability of §537.060, RSMo, was previously decided by this Court in Norman, *supra*, and is now the law of the case. Giddens, *supra*.

Hence, because prevailing Missouri caselaw, including this Court's opinion in this case, holds that §537.060, RSMo, applies to medical malpractice cases when the parties agree not to apportion fault under §538.230, RSMo, appellants' statutory construction claim to the contrary is meritless.

Appellants prevailed in Norman, *supra*, but now argue that this Court's analysis "is incomplete and equally incorrect" (App. Br. 74). However, in point two, appellants cite this very section of Norman for the proposition that §537.060, RSMo, can be pled if done so as an affirmative defense (App. Br. 68). Respondent respectfully disagrees with appellants regarding this specific issue, but

will reserve argument and allow this Court to determine whether its analysis in Norman, *supra*, was as faulty as appellants now claim.

Appellants offer their own explanation for the "rationale set up by the Legislature" for the operation of §§538.230 and 537.060, RSMo (App. Br. 75-76). Their idea is that these two sections are for the use in cases where the defendants are comprised of healthcare providers and non-healthcare providers (App. Br. 36-37, 74-79). Yet, as with several of their other contentions, they offer no authority to support this notion. This Court should therefore deem this explanation abandoned and ignore it. Beatty, *supra*; Thummel, *supra*.

Moreover, not only have appellants not presented this issue to the trial court, they have admitted the opposite to the trial court—that §537.060, RSMo, applies to health care providers—on a number of occasions (L.F. 47-50, 96, 97, 100, 102-03, 110, 115, 191-93). In fact, their settlement agreement with the settling parties in this case—a hospital and a physician, both healthcare providers, under §538.205(4), RSMo—incorporates the terms of §537.060, RSMo, by reference (L.F. 84-85). Further, appellants have also admitted in their brief on appeal that §537.060, RSMo, applies to health care providers (App. Br. 49, 52, 68, 70).

Under these circumstances, where appellants failed to present this claim to the trial court, where this Court's holding in this case directly contradicts appellants' contention and where they admitted the opposite of what they claim on

appeal to the trial court and this Court, their claim entitles them to no relief on appeal.

B. Appellants' Claim that Respondent is Barred From Asking for Relief Under §537.060, RSMo, Because He Asked for Apportionment Under §538.230, RSMo, is Meritless Since the Parties Waived Apportionment Before Trial.

Appellants claim that respondent cannot escape the provisions of §538.230, RSMo, because he "specifically invoked the authority of same" in his second amended motion that the trial court granted (App. Br. 25, 73, 79-81).

This Court should deem this point abandoned because appellants cite no authority to support their claim that §538.230, RSMo, binds parties to submit apportionment to a jury after the completion of a trial (App. Br. 79-81). Under their Point Relied On, they list three cases, but those cases are used in the earlier claim under this point regarding statutory construction (App. Br. 25, 76). In the argument section that supports this contention, appellants list no caselaw and cite the relevant statutes only for the sake of reference, not authority (App. Br. 79-81).

"Where a party fails to support a contention with relevant authority or argument beyond conclusions, the point is considered abandoned." Beatty v. State Tax Com'n, 912 S.W.2d 492, 498-99 (Mo. banc 1995).

Although this Court may find this point abandoned, should it choose to review it, this Court will find it meritless. After trial, respondent did plead §538.230, RSMo, in his second amended motion (L.F. 134-39, 177-89). However,

before trial, the parties waived the application of §538.230, RSMo: "in a pre-trial conference, Dr. Wright orally waived jury apportionment under section 538.230. The Normans agreed. Because it was so 'agreed by all the parties,' there was no jury apportionment under section 538.230 in this case." Norman v. Wright, 100 S.W.3d 783, 784 (Mo. banc 2003). Appellants' brief and the record on appeal supports this Court's finding that the parties agreed to waive apportionment (App. Br. 11, 14, 15, 29, 42, 44-45, 68, 80; L.F. 47-50, 58, 61, 103, 106, 108, 111, 113, 117, 165, 178).

Further, waiver of §538.230, RSMo, is expressly permitted in subsection three of §538.230, RSMo, which states: "the court, **unless otherwise agreed by all the parties**, shall instruct the jury to apportion fault among such persons and parties" (emphasis added).

Accordingly, because both parties agreed to waive their rights under §538.230, RSMo, before trial, that statute did not apply to the trial in this case. Id. Norman, *supra*. As a result, any post-trial pleading respondent may have made regarding this statute is meaningless since fault cannot be apportioned by a jury after the conclusion of the trial. *See* Norman, *supra* at 785 ("if all the parties agree not to apportion fault under section 538.230, section 537.060 applies."). Appellants are not requesting a new trial for apportionment (App. Br. 79).

Under these circumstances, appellants' claim that respondent is bound to the requirements of that statute because he invoked its provisions fails as a matter

of law and as a matter of fact. Appellants' third point on appeal entitles them to no relief.

CONCLUSION

This Court should affirm the trial court's Judgment of July 30, 2003 sustaining respondent's motion to amend his answer to plead §537.060, RSMo, as an affirmative defense because appellants have failed to show that the trial court's ruling was an abuse of discretion, that the trial court committed error, plain or otherwise, or that they suffered prejudice as a result of the court's ruling.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 15,487 words, excluding the cover, this certification and the appendix as determined by Microsoft Word software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were hand-delivered this____day of October, 2004, to:

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APPENDIX